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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CM(M) 1430/2023 & CM APPL. 45720/2023**

RENU ARORA

..... Petitioner

Through: Mr. Dikshant Khanna, Advocate

versus

SURESH KUMAR & ANR

..... Respondent

Through: Mr. R.K. Gupta, Advocate along with
R-1 in person
R-2 present in person

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Date of Decision: 15th December, 2023

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. This petition filed under Article 227 of Constitution of India impugns the orders dated 04.06.2022 and 19.07.2023 passed by the ADJ-02, South East District, Saket Courts, New Delhi ('Trial Court') in civil suit bearing CS DJ No. 11266/2016, titled as '**Suresh Kumar v. Kamal Arora**'.

1.1 The Trial Court vide order dated 04.06.2022 dismissed the Petitioner's application filed under Order I Rule 10 of Code of Civil Procedure, 1908 ('CPC') seeking impleadment as a co-defendant; and subsequently, vide order dated 19.07.2023 Trial Court dismissed the application seeking review of the said order dated 04.06.2022.

1.2 The Petitioner is a stranger to the civil suit. The Respondent No.1 is the



plaintiff and Respondent No.2 is the sole defendant.

1.3 The civil suit has been filed by the Respondent No.1 seeking specific performance of an Agreement to Sell ('ATS') dated 06.11.2006 and permanent injunction with respect to built-up structure and without terrace rights and space open to sky on the back portion of 'first floor' of property bearing No. A-39, East of Kailash, New Delhi – 64 ('suit property'). The ATS is admittedly signed between Respondent No. 1 and Respondent No. 2 alone.

1.4 The Petitioner, who is seeking impleadment is the sister of Respondent No. 2 i.e., the defendant.

2. The said application for impleadment has been opposed by Respondent No.1 i.e., the plaintiff.

Submissions of the counsel for the Petitioner

3. Learned counsel for the Petitioner states that the Trial Court failed to consider that Petitioner herein has on 20.03.2019 filed a separate civil suit for partition (i.e., civil suit no. 240 of 2019) claiming title rights in the suit property. He states that admittedly, late Sh. Mulakh Raj was owner of 50% share of the suit property and he died intestate. He states that since the Petitioner is the Class-I legal heir of said late Sh. Mulakh Raj, she admittedly, has a fair semblance of title in the suit property.

3.1 He states that the Petitioner has disputed the alleged registered Will dated 22.04.2002 executed by late Sh. Mulakh Raj and the no objection affidavit dated 05.03.2005 bearing signatures of the Petitioner, relied upon by Respondent No.2. He states Petitioner denies her signatures as the attesting witness to the said registered Will and the said no objection affidavit.

3.2 He states that the Petitioner herein is entitled to seek impleadment in this suit for specific performance; and he places reliance upon the judgments



of this Court in *Rajesh Kumar Arora and Ors. v. Smt. Shila and Ors., 2016 SCC OnLine Del 1277 ('DB')* and *Anjana Vij v. Krishan Dev and Anr., 2011 SCC OnLine Del 1184*.

3.3 He states that the Petitioner in the civil suit filed in the year 2019, has sought partition of the suit property and has challenged the genuineness of the registered Will dated 22.04.2002 therein.

Submissions of the counsel for the Respondent No.1, plaintiff

4. In reply, learned counsel for Respondent No.1 states that the application under Order I Rule 10 CPC has been filed by the Petitioner herein in collusion with Respondent No.2 inasmuch as the said application was filed at the stage of final arguments, after a contested proceeding and closure of defendant's evidence on 17.07.2018.

4.1 He states that, in fact, during the course of final arguments the Petitioner barged into the courtroom and disrupted the proceedings in a bizarre manner and has lowered the authority of the Court.

4.2 He states that Respondent No.2 along with his late father, Sh. Mulakh Raj Arora, were the owners of the suit property in equal shares i.e., 50% each. He states that after the death of Sh. Mulakh Raj Arora, his 50% share devolved upon Respondent No.2 by way of the registered Will dated 22.04.2002. He states that, in fact, all the Class-I legal heirs of late Sh. Mulakh Raj Arora have executed no objection affidavits dated 05.03.2005 in favour of Respondent No.2. He states that thus, relying upon the aforesaid documents, the Municipal Corporation of Delhi ('MCD') mutated the suit property in favour of Respondent No.2 on 04.04.2005.

4.3 He states that Petitioner is one of the attesting witnesses to the registered Will dated 22.04.2002 and has executed the no objection affidavit



dated 05.03.2005. He states that therefore, her claim that late Sh. Mulakh Raj Arora died intestate is false and she has no right, title or interest in the suit property.

4.4 He states that the Respondent No.1 i.e., the plaintiff, is the dominus litis and he opposes the impleadment of the Petitioner herein as a defendant. He relies upon the judgment of the Supreme Court in ***Gurmit Singh Bhatia v. Kiran Kant Robinson and Ors., (2020) 13 SCC 773.***

5. The Respondent Nos. 2 had entered appearance; however, no arguments were addressed by him.

Findings and Analysis

6. This Court has considered the submissions of the learned counsel for the parties and perused the record.

7. The relevant facts necessary for deciding the present controversy are as under:

7.1 The suit property was purchased vide registered sale deed dated 28.07.2001 by Respondent No.2 and his father late Sh. Mulakh Raj Arora, with each having 50% share therein.

7.2 Late Sh. Mulakh Raj Arora executed a registered Will and registered General Power of Attorney ('GPA') both dated 22.04.2002. In this registered Will, his 50% share in the suit property was bequeathed in favour of Respondent No.2. The said Will and GPA were signed by the Petitioner herein as well as her mother Mrs. Indira Arora as attesting witnesses.

7.3 Sh. Mulakh Raj Arora passed away on 04.06.2004. He was survived by his wife Mrs. Indira Arora, three sons i.e., Mr. Manoj Arora (i.e., Respondent No.2 herein), Mr. Sanjay Arora, Mr. Kamal Arora and a daughter Mrs. Renu Arora (i.e., the Petitioner herein).



7.4 All the legal heirs of late Sh. Mulakh Raj Arora executed no objection affidavits in favour of Respondent No.2 for submission to MCD for enabling the mutation of the suit property in favour of the Petitioner in the statutory records. The property was mutated favour of Respondent No 2 in the records of MCD with a mutation letter dated 04.04.2005.

7.5 In the aforesaid manner, Respondent No.2 who earlier had ownership of 50% share; by operation of law in view of the registered Will dated 22.04.2002 and the mutation dated 04.04.2005, held himself out as the absolute owner of the suit property.

7.6 In these facts and circumstances, the Respondent No.2 entered into an Agreement to Sell dated 06.11.2006 and 02.02.2007 ('subject ATS' or said ATS) with Respondent No.1 for sale of the suit property.

7.7 However, in view of the alleged non-performance of the said ATS, Respondent No.1 on 21.07.2008 filed the present suit for specific performance initially before the High Court. This Court vide order dated 22.07.2008 issued an interim injunction restraining Respondent No.2 from inter-alia creating third party rights. Subsequently, on account of the enhancement of the pecuniary jurisdiction of this Court, the suit was transferred to the District Court.

7.8 The suit was fiercely contested between the parties and defendant's evidence (DE) was closed on 17.07.2018. The matter was listed for final arguments before the court and it was at one such hearing during final arguments that the Petitioner herein on 27.07.2019 filed the Order 1 Rule 10 CPC application seeking impleadment as a co-defendant, which is under consideration.

7.9 The Petitioner has alleged in the application that she does not admit to



the validity of the registered Will dated 22.04.2002 and disputes her signatures as one of the attesting witnesses. She has also disputed her signatures on the no objection affidavit dated 05.03.2005 filed before MCD.

She has contended that her mother Mrs. Indira Arora's signature on the registered Will and affidavit are forged. She has contended that the signatures of her brothers Mr. Manoj Arora and Mr. Sanjay Arora on the no objection affidavits dated 05.03.2005 are forged.

7.10 She has relied upon the pendency of a suit for partition, declaration and permanent injunction filed on 23.03.2019 in the District Court by all the legal heirs of late Sh. Mulakh Raj Arora with respect to the suit property.

8. In this impleadment application, the Petitioner has sought impleadment of herself, her mother, Mrs. Indira Arora, and her brothers i.e., Sh. Manoj Arora and Sh. Sanjay Arora.

8.1 It needs to be noted here itself that said Mrs. Indira Arora, Sh. Manoj Arora and Sh. Sanjay Arora are not pursuing this application or relief sought therein. The application is neither signed by the legal heirs nor supported by their affidavit. The application is signed and affirmed by the Petitioner alone.

8.2 It has also come on record that Mrs. Indira Arora (wife of late Sh. Mulakh Raj Arora), who was originally arrayed as the plaintiff no.1 in the partition suit i.e., suit no. 240 of 2019 has moved an application therein seeking withdrawal of the suit having settled the matter; and she was transposed as defendant no.3 in the partition suit.

8.3 In fact, as per Respondent No.1, Mrs. Indira Arora has since confirmed her signatures as attesting witness on the registered Will dated 22.04.2022 and her signatures on no objection affidavit filed before MCD.

9. The application for impleadment has been opposed by Respondent



No.1 on the ground that the same has been filed by the Petitioner in collusion with Respondent No.2; and the claims of the Petitioner are belied by the fact that she is the attesting witness to the registered Will dated 22.04.2002 and has executed the no objection affidavit dated 05.03.2005 filed before the MCD.

9.1 The Trial Court by its impugned order dated 04.06.2022 has dismissed the application filed by the Petitioner holding that in view of the law laid down by Supreme Court in **Gurmit Singh Bhatia** (supra), the Petitioner has not made out a case for impleadment especially since the Respondent No.1 who is the dominus litis has opposed the application. The Trial Court by its subsequent impugned order dated 19.07.2023 dismissed the review application filed by the Petitioner herein.

10. The Trial Court dismissed the application filed by the Petitioner seeking impleadment for herself and the other members of the family i.e., her mother, Mrs. Indira Arora and her brothers i.e., Mr. Manoj Arora and Mr. Sanjay Arora ('mother and brothers') on the ground that the said individuals have not sought their impleadment; and the Petitioner who is a third party cannot maintain an application on behalf of the said persons. This Court finds no infirmity in the said finding of the Trial Court.

10.1 It is a matter of record that the mother and brothers are not seeking impleadment and Mrs. Indira Arora has withdrawn as a plaintiff from the suit for partition (and transposed as defendant no.3 in partition suit); whilst confirming the ownership of Respondent No.2. For this reason, as well no application seeking their impleadment can be maintained by the Petitioner.

11. The Trial Court while dismissing the Petitioner's application seeking her impleadment relied upon the law settled by Supreme Court in **Gurmit**



Singh Bhatia (supra) holding that in a suit for specific performance the plaintiff is the dominus litis. In the facts of this case, the Respondent No.1 (i.e., the plaintiff) has opposed the impleadment of the Petitioner on the ground that the application is collusive and has been filed at this stage of final arguments to delay the final adjudication. This Court finds no infirmity in this finding of the Trial Court for the reasons set out here under.

11.1 The Supreme Court in *Kasturi v. Iyyamperumal and Others*, (2005) 6 SCC 733 while adjudicating upon an application filed by third parties seeking impleadment in a suit for specific performance, set aside the orders of the Trial Court and the High Court permitting the impleadment and held that since the third parties were not a party to the contract, which was the subject of said specific performance, the plaintiff cannot be forced to join the said third parties in the suit. The relevant portion of the judgment reads as under:

“20 ... In view of the discussions made herein earlier, the two tests by which a person who is seeking addition in a pending suit for specific performance of the contract for sale must be satisfied. As stated herein earlier, first, there must be a right to the same relief against a party relating to the same subject-matter involved in the proceedings for specific performance of contract for sale, and secondly, it would not be possible for the court to pass effective decree or order in the absence of such a party. If we apply these two tests in the facts and circumstances of the present case, it would be evident that Respondents 1 and 4 to 11 cannot satisfy the above two tests for determining the question whether a stranger/third party is entitled to be added under Order 1 Rule 10 CPC only on the ground that if the decree for specific performance of the contract for sale is passed in absence of Respondents 1 and 4 to 11, their possession over the contracted property can be disturbed or they can be dispossessed from the contracted property in execution of the decree for specific performance of the contract for sale obtained by the appellant against Respondents 2 and 3. Can it be said that Respondents 1 and 4 to 11 had any direct interest in the subject-matter of the instant suit for specific performance of the contract for sale? In our view Respondents 1 and 4 to 11 had no direct interest in the suit for specific performance because they are not parties to the contract nor do they claim any interest from the parties to the litigation. One more aspect may be considered in this connection. It is that the jurisdiction of the court to add an



applicant shall arise only when the court finds that such applicant is either a necessary party or a proper party.

21. It may be reiterated here that if the appellant who has filed the instant suit for specific performance of contract for sale even after receiving the notice of claim of title and possession by Respondents 1 and 4 to 11 does not want to join Respondents 1 and 4 to 11 in the pending suit, it is always done at the risk of the appellant because he cannot be forced to join Respondents 1 and 4 to 11 as party-defendants in such suit. ...

(Emphasis Supplied)

11.2 In the aforesaid judgment of **Kasturi** (supra) the Supreme Court laid down two tests which a person seeking impleadment in a suit for specific performance must satisfy. In the facts of this case, admittedly the Petitioner is not a party to the ATS and therefore, she fails to satisfy the first test. So also, since the Respondent No.1 is claiming his reliefs against Respondent No.2 alone, and therefore, the presence of the Petitioner herein is not required for passing an effective decree. The Petitioner, therefore, does not satisfy the two tests laid down by the Supreme Court.

11.3 Further, as observed by the Supreme Court that if the plaintiff in the suit for specific performance is willing to continue the suit despite being aware of the rival claim set up by the third party, he does so at his own risk; however, the court will not compel him to join the third party as a defendant. In the facts of this case as well, Respondent No.1 i.e., the plaintiff has consciously elected to oppose the application and therefore, the Trial Court has rightly exercised its jurisdiction in rejecting the application for impleadment.

11.4 The Supreme Court reiterated the aforesaid principles, laid down in **Kasturi** (supra) governing the law of impleadment of a third party in the suit for specific performance, in the judgment of **Gurmit Singh Bhatia** (supra). The Supreme Court held that a third party or a stranger to the contract to sell



is not a necessary party as no relief was sought against the said party. The relevant portions of the judgment **Gurmit Singh Bhatia** (supra) reads as under:

“5.3. ... That thereafter, after observing and holding as above, this Court in Kasturi [Kasturi v. Iyyamperumal, (2005) 6 SCC 733] further observed that in view of the principle that the plaintiff who has filed a suit for specific performance of the contract to sell is the dominus litis, he cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the rule of law.

5.4. In the aforesaid decision in Kasturi, it was contended on behalf of the third parties that they are in possession of the suit property on the basis of their independent title to the same and as the plaintiff had also claimed the relief of possession in the plaint and the issue with regard to possession is common to the parties including the third parties, and therefore, the same can be settled in the suit itself. It was further submitted on behalf of the third parties that to avoid the multiplicity of the suits, it would be appropriate to join them as party defendants. This Court did not accept the aforesaid submission by observing that merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract to sell because they are not necessary parties as there was no semblance of right to some relief against the party to the contract. It is further observed and held that in a suit for specific performance of the contract to sell the lis between the vendor and the persons in whose favour agreement to sell is executed shall only be gone into and it is also not open to the Court to decide whether any other parties have acquired any title and possession of the contracted property.

*5.5. It is further observed and held by this Court in Kasturi that if the plaintiff who has filed a suit for specific performance of the contract to sell, even after receiving the notice of claim of title and possession by other persons (not parties to the suit and even not parties to the agreement to sell for which a decree for specific performance is sought) does not want to join them in the pending suit, **it is always done at the risk of the plaintiff because he cannot be forced to join the third parties as party defendants in such suit. The aforesaid observations are made by this Court considering the principle that the plaintiff is the dominus litis and cannot be forced to add parties against whom he does not want to fight unless there is a compulsion of the rule of law.***

5.6. Therefore, considering the decision of this Court in Kasturi, the appellant cannot be impleaded as a defendant in the suit filed by the original plaintiffs for specific performance of the contract between the original plaintiffs and original Defendant 1 and in a suit for specific performance of the contract to which the appellant is not a party and that too against the wish of



the plaintiffs. The plaintiffs cannot be forced to add party against whom he does not want to fight. If he does so, in that case, it will be at the risk of the plaintiffs.”

(Emphasis Supplied)

11.5 In both the aforesaid judgments, Supreme Court has observed with emphasis that in a suit for specific performance when the plaintiff (i.e., the vendee) elects not to implead a third party who stakes a rival claim to the suit property he does so at his own risk. The effect of the same is that the decree of specific performance obtained by the plaintiff in the present suit though Will bind the defendant herein as well as any party claiming under the said defendant; however, it will not bind a third party who claims an independent title in the suit property, which is not through the defendant.

11.6 The rights, if any, of the Petitioner in the subject property are a subject matter of determination in civil suit no. 240 of 2019 filed by her for partition. Mrs. Indira Arora has already withdrawn her claim in the said suit, in favour of Respondent No.2 herein. The ownership of Respondent No.2 in the suit property to the extent of 70% is, therefore, beyond any dispute. The Petitioner is claiming 10% share in the property, though the said claim prima facie is contrary to the registered sale deed dated 28.07.2001, registered Will dated 22.04.2002 attested by the Petitioner and the no objection affidavit dated 05.03.2005 executed by the Petitioner confirming the absolute ownership of the Respondent No.2. In view of the said registered documents, the Respondent No.2 is prima facie the absolute owner of the suit property.

11.7 Even if arguendo, the Petitioner's claim of 10% is assumed to be correct, in view of the provisions of Section 44 of the Transfer of Property Act, 1882, the Respondent No.2 is competent to dispose of his admitted share of 70% in the suit property. (Re: **Pawan Kumar Dutt & Anr. v. Shakuntala**



***Devi & Ors.*¹ and *Kartar Singh v. Harjinder Singh & Ors.*²)**

12. The Petitioner is admittedly not a party to the subject ATS. Late Sh. Mulakh Raj through whom the Petitioner claims a title is also not a party to the said ATS. The Trial Court in the present suit is concerned with adjudication of the rights of Respondent No.1 asserted through the subject ATS against Respondent No.2. The question that is to be decided by the Trial Court is the enforceability of the subject ATS entered into between the parties to the contract. The Petitioner is, however, seeking impleadment to oppose the reliefs sought in the plaint on the plea of an independent title claimed through late Sh. Mulakh Raj and thereby convert the suit for specific performance into a title suit, which as held by the Supreme Court in ***Kasturi*** (supra) is not permissible when the plaintiff i.e., Respondent No.1 opposes the said impleadment.

13. In this case as noted above, the suit was instituted in the year 2008 and was pending at the stage of the final arguments, when in 2019 this application for impleadment was filed by the Petitioner. This Court also finds merit in the submissions of the Respondent No.1 that the delayed filing of this application does not appear to be in good faith.

14. This Court is therefore of the opinion that the order of the Trial Court dismissing the application of the Petitioner is correct in law and facts.

MANMEET PRITAM SINGH ARORA, J

December 15, 2023/msh/hp/aa

¹ (2010) 15 SCC 601

² (1990) 3 SCC 517